

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**LARRY M. COWAN, et al.,
Grievants,**

v.

DOCKET NO. 2010-1537-CONS

**RITCHIE COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievants Larry M. Cowan and Jeffrey G. Sheets¹ filed a grievance against their employer, the Ritchie County Board of Education, on June 3, 2010, when neither was hired for three posted summer Bus Operator positions. As relief Grievants sought, “instatement into this summer position if it exists in subsequent summers, retroactive wages and benefits, summer priority, also award of interest on monetary sums.”

A hearing was held at level one on June 22, 2010,² and a level one decision denying the grievance was issued on July 9, 2010.³ Grievants appealed to level two on July 14, 2010, and a mediation session was held on December 3, 2010. Grievants appealed to level three on December 9, 2010. A level three hearing was held before

¹ Marcia Stansberry was also a Grievant at levels one and two, but withdrew from the grievance on or about January 5, 2011.

² The record does not contain a transcript of the level one hearing, as there was a problem with the recording, and it could not be transcribed.

³ The only date on the decision is the certificate of service, which says it was mailed on June 9, 2010, which would have been before the level one hearing. It is presumed that this should have been July 9.

Administrative Law Judge Carrie H. LeFevre, on August 30, 2011, at the Grievance Board's Charleston office. Grievant was represented by Jeffrey G. Blaydes, Esquire, Carbone & Blaydes, P.L.L.C., and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on October 3, 2011, on receipt of the last of the parties' proposed findings of fact and conclusions of law. This matter was reassigned to the undersigned Administrative Law Judge for administrative reasons on January 5, 2012.

Synopsis

Grievants argued that the three Bus Operator positions posted for the summer of 2010 were newly created positions, because Respondent had never before called its summer learning program for students "STARS." Grievants argued the positions should have been filled based on regular seniority, not summer seniority. Respondent has operated a summer learning program for students for many years under various names. It has employed Bus Operators to transport students during the summer as federal grant funding allowed, ranging from a maximum of five Bus Operators several summers, to no Bus Operators one summer, and one Bus Operator in the summer of 2009. The three summer Bus Operator positions were not newly created positions, and were properly filled based on summer seniority.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant Cowan is employed by the Ritchie County Board of Education ("RBOE") as a regular Bus Operator. His regular seniority date is January 18, 1994. Grievant Cowan worked one summer as a Bus Operator for RBOE, transporting students from the County 4-H grounds to North Bend State Park. The record does not reflect when this occurred, nor does RBOE have a record of this summer employment.

2. Grievant Sheets is employed by RBOE as a regular Bus Operator. His regular seniority date is May 1, 1995. Grievant Sheets worked during the summers of 1999 and 2000 as a Bus Operator.

3. During the summer of 2005, RBOE employed Pat Boone, Brenda Rhodes, Richard Johnson, Leonard Scott, and Barbara Amos as Bus Operators, transporting students enrolled in what was referred to as APPLE, Activities Providing Positive Learning Experiences.

4. APPLE was federally funded through a Title IV 21st Century grant. Grants are awarded for a limited number of years.

5. No Bus Operators were employed by RBOE during the summer of 2006.

6. Five Bus Operators were employed by RBOE during the summer of 2007, transporting students, Brenda Rhodes, Barbara Amos, Richard Johnson, Peter Schumacher, and Leonard Scott. The funding for the summer program in 2007 was federal funding funneled through the West Virginia University Extension Service, and the program was referred to as Energy Express.

7. During the summer of 2008, RBOE employed four Bus Operators to transport students. The four Bus Operators employed by RBOE during the summer of 2008 were

Barbara Amos, Richard Johnson, Peter Schumacher, and Leonard Scott. Once again the students transported were enrolled in Energy Express.

8. During the summer of 2009, RBOE reduced the number of Bus Operators employed to transport students enrolled in Energy Express, from four in the summer of 2008, to just one Bus Operator, Leonard Scott.

9. On March 9, 2010, RBOE posted three summer Bus Operator positions. The posting stated that the Bus Operators would be transporting students enrolled in STARS - 21st Century. STARS is an acronym for Strategies Targeting Ritchie Students.

10. STARS is federally funded through a Title IV 21st Century grant. Although a new grant had to be written to fund STARS, the funding source for what is referred to as STARS is the same as the funding source for APPLE.

11. RBOE did not fill the summer positions posted on March 9, 2010, because Grievant Cowan questioned the hiring process at a County Board meeting. The positions were reposted on May 12, 2010. Grievants applied for the summer Bus Operator positions, as did several other regularly employed Bus Operators.

12. The three posted summer Bus Operator positions at issue here were awarded to Richard Johnson, Peter Schumacher, and Brenda Rhodes.

13. Mr. Schumacher's regular seniority date is March 25, 1986, making him more senior than either Grievant, and he also had more summer seniority than either Grievant, having worked as a Bus Operator five summers since 1999.

14. Mr. Johnson's regular seniority date is August 20, 1999, making him less senior than either Grievant. Mr. Johnson was employed as a Bus Operator by RBOE during the summer for eight summers since 1999, including the summer of 2008,

transporting Energy Express students, and the summer of 2005 transporting APPLE students.

15. Ms. Rhodes' regular seniority date is October 31, 2000, making her less senior than either Grievant. Ms. Rhodes was employed as a Bus Operator by RBOE during the summer for four summers since 1999.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants argued that the summer Bus Operator positions at issue were newly created, and should have been filled based on regular seniority. Grievants derive their understanding of the situation from the fact that the names of the summer programs for students have changed over the years, the student services provided and students targeted were different, and there had never been a summer program in Ritchie County referred to as STARS. Respondent argued that Respondent's summer transportation program is "a single program, and the 'job or position,' as referenced in the statute, is

simply that of ‘summer bus operator.’” Respondent argued that after the reduction in the number of Bus Operators in the summer of 2009, the Bus Operators with the most summer seniority were recalled to the positions available during the summer of 2010, as required by statute.

W. VA. CODE § 18-5-39 provides the basis for assigning summer employment, stating with regard to the hiring of service personnel for summer employment as follows:

(f) Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight [18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [18A-4-8b], article four, chapter eighteen-a of this code.

* * *

(g) If a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification.

This CODE Section “provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists. [citations omitted]” *Lemley v. Wood County Bd. of Educ.*, Docket No. 99-54-198 (Sept. 9, 1999). “Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years[. . .]” *Kennedy v. Marion County Bd. of Educ.*, Docket No. 91-24-427 (Dec. 30, 1991).” *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 96-30-408 (April 25, 1997). “The seniority

granted to regularly employed workers and the "seniority" granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled. W. VA. CODE §§ 18-5-39; 18A-4-8b; & 18A-4-8g. *Bowmen [sic] v. Kanawha County Bd. of Educ.*, Docket No. 99-20-039B (Mar. 31, 1999).” *Beane v. Kanawha County Bd. of Educ.*, Docket No. 03-20-008 (April 30, 2003).

After this, the statute is not so clear; however, the Grievance Board has determined that there exists a “legislative intent and statutory preference for honoring prior summer service over regular county seniority.” *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (April 16, 2010). This determination is supported by the plain language of the statute which does not end with the phrase “particular summer program” in the reduction-in-force and preferred recall provision; rather, the statute goes on to include the words, “or classification,” thus broadening the scope of coverage. Grievants would have the undersigned ignore this preference by requiring that the statutory preference only applies if the name chosen for the summer program remains the same.

“The Grievance Board has also determined that some flexibility exists in the definition of ‘same assignment.’ It is enough that there is consistency in the type of work being performed, even if the location and exact nature of the work is somewhat different. By way of example, bus operators’ positions remain the same even though the routes change from summer to summer, school lunch programs at different schools are part of one overall summer lunch program, and a summer transportation program employing aides remain the same program even though the routes change from summer to summer. *Lilly v. Fayette County Bd. of Educ.*, Docket No. 96-10-481 (Sept. 15, 1997); *Lilly v. Fayette*

County Bd. of Educ., Docket No. 99-10-43[3] (Mar. 17, 2000); *Williams v. Kanawha County Bd. of Educ.*, Docket No. 0[1]-20-058 (May 10, 2001); *Costello v. Monongalia County Bd. of Educ.*, Docket No. 01-30-016 (June 21, 2001).” *Eisentrout, supra*.

In *Williams, supra*, the Administrative Law Judge found that Kanawha County operated one lunch program during the summer at numerous locations throughout the county, and that the sites may change from summer to summer. In making this determination the Administrative Law Judge considered that, “there is no indication that separate programs exist for federal or state programs such as Head Start, or for students identified by any particular characteristic other than age. There is no indication of separate funding, bookkeeping, or any other evidence to establish that each school was a separate program.”

It is clear that Respondent has operated a summer learning program for students for many years, although the name of the program has not remained the same. The program has been dependent on the amount of federal funding available, and in particular, the number of Bus Operators hired has varied, depending on the amount of federal funding available. The number of Bus Operators employed to transport students in a summer learning program was reduced during the summer of 2009 to one Bus Operator, but a new grant provided sufficient funding that Respondent could recall Bus Operators employed in prior summers to available Bus Operator positions during the summer of 2010, based on the amount of summer seniority they had attained. These were not newly created positions, and they were properly filled based on summer Bus Operator seniority.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years[. . .]' *Kennedy v. Marion County Bd. of Educ.*, Docket No. 91-24-427 (Dec. 30, 1991)." *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 96-30-408 (April 25, 1997).

3. "The seniority granted to regularly employed workers and the "seniority" granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled. W. VA. CODE §§ 18-5-39; 18A-4-8b; & 18A-4-8g. *Bowmen [sic] v. Kanawha County Bd. of Educ.*, Docket No. 99-20-039B (Mar. 31, 1999)." *Beane v. Kanawha County Bd. of Educ.*, Docket No. 03-20-008 (April 30, 2003).

4. There exists a “legislative intent and statutory preference for honoring prior summer service over regular county seniority.” *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (April 16, 2010).

5. “The Grievance Board has also determined that some flexibility exists in the definition of ‘same assignment.’ It is enough that there is consistency in the type of work being performed, even if the location and exact nature of the work is somewhat different. By way of example, bus operators’ positions remain the same even though the routes change from summer to summer, school lunch programs at different schools are part of one overall summer lunch program, and a summer transportation program employing aides remain the same program even though the routes change from summer to summer. *Lilly v. Fayette County Bd. of Educ.*, Docket No. 96-10-481 (Sept. 15, 1997); *Lilly v. Fayette County Bd. of Educ.*, Docket No. 99-10-43[3] (Mar. 17, 2000); *Williams v. Kanawha County Bd. of Educ.*, Docket No. 0[1]-20-058 (May 10, 2001); *Costello v. Monongalia County Bd. of Educ.*, Docket No. 01-30-016 (June 21, 2001).” *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010).

6. Grievants had less summer Bus Operator seniority than those employees placed in the summer Bus Operator positions at issue, and they did not enjoy any preference for those assignments over employees who worked the summer assignments in the preceding years.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 20, 2012

BRENDA L. GOULD
Administrative Law Judge